ranged between him and those who lose interests in the parcels sold on execution. The case of *Dacre* v. *Gorges*, 2 Sim. & St. 454, indicates how such compensation is secured under the English practice; but as no such interference is necessary to protect the purchasers on execution, we are not called upon in this case to consider what the proper method may be.

The judgment in each of the causes brought up must be reversed with costs and a new trial granted.

Common Pleas of Summit County, Ohio.

JOHN R. PENN, TRUSTEE, *v.* THE ATLANTIC AND GREAT WESTERN RAILWAY COMPANY AND OTHERS.

A court of equity has power to decree a foreclosure of a junior mortgage and a sale of the mortgaged property thereunder subject to the outstanding lien of a senior mortgage.

The 374 section of the Code of Civil Proceedings of Ohio does not interfere with the exercise of such power.

The right in equity to redeem the mortgaged property belongs to every person who has a legal or equitable lien on the same, provided he comes in as privy in estate with the mortgagor.

Where a junior incumbrancer pays the amount due on a prior incumbrance, he is entitled to be subrogated to the rights of such prior incumbrancer as against the mortgagor.

But where the interest only upon the debt secured by the prior mortgage is due, and the same is paid by a subsequent mortgagee, his lien upon the mortgaged property, which results from such payment, will be postponed to the payment of the residue of the prior mortgage debt.

Morrison R. Waite, *William W. MacFarland* and *Sherlock J. Andrews* for the plaintiff.

Rufus P. Ranney and *Otis & Adams* for the first mortgage trustees.

Wm. H. Upson for himself.

The opinion of the court was delivered by

BOYNTON, J.—Previous to 1865 the Atlantic and Great Western Railroad Company of Ohio was a corporation—the owner of a railroad running from Dayton, Ohio, to the western line of Pennsylvania. The Atlantic and Great Western Railroad of Pennsylvania was a corporation—the owner of a railroad running from the eastern terminus of the first mentioned railroad to the eastern line of Pennsylvania. The

Atlantic and Great Western Railroad Company of New York was a corporation whose road ran from the eastern terminus of said Pennsylvania Railroad to Salamanco in the State of New York. The Buffalo extension of the Atlantic and Great Western Railroad Company was a corporation—the owner of a railroad running from Salamanco to Buffalo in the State of New York. In September, 1865, these four companies, in pursuance of the laws of the several States under which they were respectively incorporated, and by agreement among themselves, consolidated into one corporation under the corporate name of the Atlantic and Great Western Railway Company; and thereupon all the rights, privileges and franchises of each of the original corporations, all the property, real, personal and mixed, and all debts due and owing on whatever account, as well as stock subscriptions and other things in action and possession belonging to each, were transferred to and vested in the Atlantic and Great Western Railway Company, the new corporation. On the other hand, all rights of creditors, all liens upon the property of the merged companies existing at the time of the consolidation, remained in full force and attached to the new one in which they were thus merged. The latter, therefore, succeeded to the franchises and became charged with the obligations and duties of the former and of each of them.

On the first day of July, 1855, the Atlantic and Great Western Railroad Company of Ohio executed to Azariah C. Flagg and Charles J. Steadman, trustees, a mortgage deed of all its property, real, personal and mixed, acquired and to be acquired, to secure the payment of bonds then issued by said company, of which there are now outstanding in the hands of *bona fide* holders the sum of $3,740,800, on which there are warrants of interest now due and payable, amounting to $1,524,965.30. The principal of these bonds does not by their terms mature until October 1st, 1876.

On the first day of July, 1863, the same company executed to the defendant, William H. Upson, as trustee, a second mortgage deed of its property acquired and to be acquired, subject to the prior one to Flagg and Steadman, to secure the

payment of bonds then issued by the same company, of which there are now outstanding in the hands of *bona fide* holders the amount of $2,409,000, on which interest coupons are now due and unpaid, amounting to $1,093,345.89. The principal of the last-named bonds does not mature until July 1st, 1883.

After the consolidation, and on the 5th day of October, 1865, the Atlantic and Great Western Railway Company, the new corporation, executed the series of bonds stated in the amended petition, and to secure the payment thereof, executed to the plaintiff, as trustee, a mortgage deed of all their property, real, personal and mixed, or acquired and to be acquired, but subject to the special priority of liens created by the mort gages executed by the original companies prior to the consolidation.

Of the bonds secured by this mortgage to the plaintiff there has been issued the aggregate amount of $18,435,000, which are now outstanding in the hands of *bona fide* holders, and on which there are coupons for interest now due and payable, amounting to $7,354,144.03.

The principal of these latter bonds does not mature until October 15th, 1890.

After the granting clause in the first mortgage of the Atlantic and Great Western Railroad Company of Ohio, there follows this language: "To have and to hold the said premises and every part thereof unto the said Azariah C. Flagg and Charles J. Steadman, their successors in said trust and assigns, that is to say: in case the said company shall fail to pay the principal, or any part thereof, or any of the interest, or any of said bonds at the time when the same may become due and payable according to the tenor thereof when demanded, then, after sixty days from each default, upon the request of the holder of such bond, the said Azariah C. Flagg and Charles J. Steadman, their successors in said trust or assigns, may enter into and take possession of all or any part of said premises and property, and as the attorneys in fact or agents of said company by themselves or their agents or substitutes duly constituted, have, use, and employ the same, making from time to time all needful repairs, alterations and

additions thereto, and after deducting the expenses of such use, repairs, alterations, and additions, apply the proceeds thereof to the payment of the principal and interest of all said bonds remaining unpaid; or, the said Azariah C. Flagg and Charles J. Steadman, their successors in said trust or assigns, at his or their discretion, may, or on the written request of at least the holders of one-half of the bonds then unpaid, shall cause the said premises and property, or so much thereof as shall be necessary to pay and discharge the principal and interest of all such of said bonds as may then be unpaid, to be sold at public auction in the city of New York, or the city of Dayton, or Cincinnati, Ohio, giving at least ninety days' notice of time, place and terms of sale, by publishing the same in the newspapers of good circulation in each of the cities of New York, Philadelphia, Dayton and Cincinnati, and apply so much of the proceeds as may be necessary to the payment of the principal and interest of said bonds remaining unpaid."

Each and all of said corporations are largely insolvent. The trustees in the first mortgage of the Atlantic and Great Western Railroad Company of Ohio ask to have the property covered by their mortgage sold and the proceeds applied to the payment of the principal and interest of the bonds secured by such mortgage, claiming in the first place that the principal thereof is due and payable by virtue of the above-recited provisions of their mortgage, default having been made of the payment of the overdue interest within sixty days from its maturity, and secondly, that if such principal is not due, the 374th section of the Code of Civil Procedure of Ohio requires, in actions for the foreclosure of a mortgage, the whole mortgaged property to be sold, the priorities of lien determined and the fund arising from the sale distributed accordingly. The trustee in the second mortgage of the last named company, defendant, and the said plaintiff, severally deny that the principal of the bonds secured by said first mortgage of that company is due and payable, and the plaintiff claims the right—a claim conceded by the second mortgage trustee—to redeem the property under the first and second mortgages, by paying the amount now due thereon, and the further right of subrogation to the rights of each of said

mortgagees against the mortgagor, subject to the prior mortgages. In view of these facts and the claims of the parties, what are their respective rights? It will be observed by recurring to the facts above stated, that there are $6,149,800 of principal on the first and second mortgage bonds not yet due, $3,740,800 maturing October 1st, 1876, and $2,409,000 July 1st, 1883, unless this principal has become due by reason of the nonpayment of the overdue interest. If the court has discretionary power to order the whole property to be sold and the fund distributed among the lien holders, the first mortgage trustees being willing to receive the debt secured by their mortgage, even though it be held to be not due; or if it has like discretionary power to order it sold, subject to the lien of the prior mortgages, such discretion should be so exercised as to enable the parties to realize the greatest sum for the property, while at the same time the rights of each are fully protected. And here the fact should not be overlooked that the property to be sold is a railroad of nearly two hundred and fifty miles in length, in this State, with all its equipments and appurtenances. This vast property is worth many millions of dollars, and consequently those able to purchase it must be few in number. The larger the sum to be paid at once the more limited the number of bidders. To my mind there is little doubt that a much larger sum will be realized for this property if sold subject to the lien for the payment of the bonds as they mature, than if sold under an order requiring its whole value to be paid on the day of sale.

By a sale subject to the incumbrances the more remote bondholders will be better protected, inasmuch as their chances of receiving a portion or all their debts will be improved.

Can such a sale be ordered consistently with the due observance of the legal and equitable rights of all the parties?

The claim of the first mortgagee, that the principal of the bonds secured by that mortgage is due by the terms of the instrument itself, inasmuch as there has been default of payment of the interest, is sought to be supported by the following authorities: *Noyes* v. *Clark*, 7 Paige 179, *Noonan* v. *Lee*

2 Black 499; 28 Barb. 29, 37; Id. 60, 44; Id. 336; 4 Taunt. 227; 5 Barn. & Adol. 40.

These authorities hold that if there be an express condition in a mortgage, that upon default of payment of the interest as it matures, or an instalment of the principal, the whole debt shall become due, such a condition is valid; that the courts will not interfere to relieve the mortgagor from payment of the principal, but will enforce the condition according to its terms. These authorities are not, however, in point.

The terms of this first mortgage of the Atlantic and Great Western Railroad Company of Ohio do not make the principal due on non-payment of the interest as it matures. They authorize the trustees, in case the company shall fail to pay the principal or any part thereof, or any of the interest on any of said bonds at the time when the same may become due and payable according to the tenor thereof when demanded, and after sixty days from such default, on request of any bondholder, to take possession of and operate said railroad; and after deducting expenses, etc., to apply the remainder of the earnings to the payment of principal and interest of all unpaid bonds; or they are authorized to sell the property on giving ninety days notice, and apply the proceeds of the sale in the same manner.

The mortgage nowhere declares that the principal shall become due upon default of payment of the interest. Power to sell at public auction and apply the proceeds to all unpaid bonds does not change the time when the principal of the bonds is to become payable so as to authorize an action on the bond or a proceeding to foreclose the mortgage in equity. The case on this point is identical in principle with that of *Holden* v. *Gilbert*, 7 Paige 208. It was there held on a similar clause in a mortgage that it was only intended to authorize a statute foreclosure in case of the non-payment of the instalments within the time prescribed, and the right to retain the principal and interest of the whole debt in case the instalment and costs were not paid before the sale, but that a mere neglect to pay the instalment within the time prescribed did not make the whole debt due and payable.

In the case now before us a third mortgagee is seeking to redeem the first and second mortgages. And it would seem to be well settled that the right in equity to redeem belongs to every person who has a legal or equitable lien on the mortgaged property, provided he comes in as privy in estate with the mortgagor. Washburn Real Prop., Vol. 2, 3d Ed. 162; *Gage* v. *Brewster*, 31 New York 222; *Brainard* v. *Cooper*, 10 New York 356; *Moore* v. *Beasom*, 44 N. H. 218; *The Western Insurace Co.* v. *The Eagle Fire Insurance Co.*, 1 Paige 284. The right to redeem any number of successive mortgages may be mortgaged anew and each new mortgagee succeeds to the rights of the mortgagor. Hilliard on Mortgages, Vol. 1 p. 299; *Norton* v. *Warner et al.*, 3 Edw. Ch. 107.

On a petition to foreclose by the last mortgagee he will be permitted to redeem all prior mortgages and to sell the whole premises to refund to himself the redemption money and to satisfy his own mortgage. *The Western Insurance Co.* v. *The Eagle Fire Insurance Co.*, 1 Paige 284; *Bell* v. *The Mayor*, 10 Paige 49; *Vander Kemp* v. *Shelton*, 11 Paige 39; *Moore* v. *Beasom*, 44 N. H. 218; *Norton* v. *Warner et al.*, 3 Edw. Ch. 107.

It certainly is a right which the mortgagor has, to pay the debt secured by a mortgage on his property, and thereby redeem the property from sale; and if he fails to do so, he to whom the right to redeem was last conveyed by mortgage succeeds to that right by paying off all prior incumbrances. And it is equally well settled that where a subsequent incumbrancer pays the debt secured by a prior mortgage, he is entitled to be substituted in equity to the rights of the owner of such prior mortgage against the mortgagor. *Norris* v. *Moulton*, 34 N. H. 392; *Merritt* v. *Hosmer*, 11 Gray 276; *Knowles* v. *Rablin*, 20 Iowa 101; *Cheesebrough* v. *Milliard*, 1 John Ch. 409; *Garwood* v. *Eldridge*, 1 Green Ch. 151; *Lyman* v. *Leittle*, 15 Verm. 576; Washburn Real Prop. Vol. 2, 198. This right of subrogation results to the junior incumbrancer in virtue of his relation to the mortgaged property. His mortgage conveyed to him the right to pay off former incumbrances and thereby to strengthen his own security; and

when he pays off the senior incumbrances, equity clothes him with all the rights of him to whose claim he succeeds, and treats him as the equitable assignee thereof. *Moore* v. *Beasom*, 44 N. H. 218; *Aiken* v. *Gale*, 37 N. H. 505. But the subsequent creditor can be subrogated to such rights only by full payment of the debt; Dixon on Subrogation 122. But this is when the whole debt is due, for if the subsequent mortgagee cannot redeem where the debt is payable in instalments until the last instalment becomes due, his right of redemption would in many cases be greatly impaired, if not destroyed. The owner of the debt can foreclose when the first instalment becomes due, and to pay such instalment he can sell the property. And it is certainly correct in principle to hold that, when the right to foreclose the equity of redemption accrues, the right to redeem the premises from such foreclosure attaches on paying the sum due, for the non-payment of which foreclosure is sought. The junior incumbrancer must be permitted to step in and redeem the premises, when the senior incumbrancer has the right to have them sold, if not redeemed. But such subrogation cannot take place to the prejudice of the senior mortgagee. *Butler* v. *Elliott*, 15 Cowen 187; Dixon on Subrogation 116. In other words, payment ought not to place the prior mortgagee in a worse situation than if payment were made by the mortgagor, and therefore where an instalment of principal or interest of the debt secured by the first mortgage is due and the same is paid by a subsequent mortgagee, his lien upon the mortgaged property, which results from such payment, will be postponed to the payment of the residue of the first mortgage debt. But when the amount so due is paid together with costs where the action in foreclosure has been instituted, the right of the prior mortgagee to a sale of the mortgaged property ceases, and the most he can claim is the right to apply to the court for an order of sale to satisfy future instalments when and as they become due, in the event they are not then paid. *Lansing* v. *Capron*, 1 John. Ch. 617; *Holden* v. *Gilbert* 7 Paige 211. The most material question in the case, and the one most elaborately argued by counsel, is: Has the court power, in view of section 374 of the Code of Civil Procedure

of Ohio, to decree a sale of the mortgaged property under a junior mortgage, subject to the outstanding lien of a senior mortgage? Independent of the statute, that a court of equity has this power would seem to be beyond question. *The Western Insurance Co.* v. *The Eagle Fire Insurance Co.*, 1 Paige 284; *Holford* v. *Spafford*, 10 Paige 43; *Vanderkemp* v. *Shelton*, 11 Paige 28; *Wells* v. *Chapman*, 4 Sand. Ch. 312; *Cox* v. *Wheeler*, 7 Paige 257; *Roll* v. *Smally*, 2 Halst. Ch. 464; *The Gihon* v. *Bellville & Co.*, 3 Halst. Ch. 531.

If the courts of this State have not now such power, it is because of the 374th section of the code, which declares that, "in the foreclosure of a mortgage, a sale of the mortgaged premises shall in all cases be ordered."

It is claimed on the one hand that the term "mortgaged premises" means the land, the thing, the entire ownership of everybody in the property included in the descriptive words of the mortgage; and upon the other, that the term means only the amount or *quantum* of interest covered and conveyed by the particular mortgage.

Did the Legislature intend by this section to take from a court of equity the power before possessed, to decree the foreclosure of a mortgagor's equity, under junior incumbrances, and leave the rights of superior lien-holders upon the property intact?

I think it did not so intend.

In England there are two general methods of foreclosing an equity of redemption by bill, one termed a *strict foreclosure*, whereby the mortgagee succeeds to the absolute ownership of the estate, unless the mortgager pays the mortgage debt within some time named by the court, usually six months, the other method is by a sale of the property mortgaged.

These two methods of foreclosure have prevailed, and to some extent now prevail, in many of the States of this Union. *Benedict* v. *Gilman*, 4 Paige 58; *Brainard* v. *Cooper*, 10 New York, 359; *Dradley* v. *Chester Valley Railroad Company*, 36 Penn. St. 150; *Goodman* v. *White*, 26 Conn. 317; *Den* v. *Farris*, 1 Dutch. 633.

The effect of a strict foreclosure being to extinguish the equity of redemption and vest in the mortgagee the full

ownership, and an indefeasible title to the property for no other considerations than the debt secured by the mortgage, great hardship oftentimes resulted to the mortgagor. Cases would not unfrequently arise where the mortgagor, being unable, from straitened pecuniary circumstances, to pay the mortgage debt within the time fixed by the decree, would be compelled to part with his property for much less than its real value. In such cases his pecuniary necessities became a source of profit to his creditor. And the legislature, to relieve the mortgagor debtor from consequences so inequitable, which may have grown out of a condition of poverty, provided that the property in all cases should be sold, the debt paid, and the surplus of the proceeds of sale paid over to him to whom it justly belonged. That a sale of the property mortgaged instead of a strict foreclosure should in all cases be ordered, is all, in my opinion, that was intended by this provision of the code of Ohio. To give to the language of section 374 any other construction than this would be to create a conflict between that section and sections 458 and 459 of the same code. Section 458 provides, that when a judgment debtor has not personal or real property subject to levy on execution sufficient to satisfy the judgment, any equitable interest which he may have in real estate as mortgagor, mortgagee or otherwise, shall be subject to the payment of such judgment by action; and section 459 provides that upon the ascertainment of such equitable interest the same shall be sold, the sale to be conducted in all respects as a sale upon execution at law. The equitable interest must first be ascertained and defined by the court, then appraised and sold for not less than two-thirds of its appraised value. *Coe* v. *The C. P. and I. R. R. Co.*, 10 Ohio State 372.

These two sections give to the judgment creditor the right to subject an equity in real estate to the payment of his debt, and this equity may be sold subject to the rights and liens of all others in and upon the property, whether legal or equitable. Now, can it be said that the legislature intended to give to a judgment creditor who has no lien upon the property, until declared by the court, the right to sell an equitable interest, subject to the rights or liens of others, and to with-

hold such right from a mortgage creditor? If the second mortgagee sue at law and recover a judgment upon his debt and make that judgment the basis of an equitable action to reach and subject his mortgagor's interest in the mortgaged property, it is not doubted that he would be entitled to the effectual aid of the court under the power conferred by section 458.

If he will ignore his mortgage liens and proceed as upon a debt unsecured, he may cause the interest of the mortgagor in the very property covered by his mortgage to be sold subject to the lien of the first or any other mortgage. In such case he becomes a judgment creditor, and notwithstanding he may so proceed and sell, it is claimed, if he seeks to enforce in equity the lien of his mortgage, a lien created by the express contract of the parties the right to sell subject to the lien of the mortgage is lost. Let us see how this doctrine would work in practice?

A mortgages his farm to B to secure a loan for twenty years; he then executes a second mortgage to C to secure a loan for six months. At the expiration of the six months C proceeds to foreclose his mortgage, making B and A parties defendant. B refuses to receive his debt until the expiration of the time for which his money was loaned. The court orders the interest of the three parties, A, B and C, to be sold, conveying to the purchaser a clear title to the property. The result must follow that B's interest in the fund realized from the sale must be invested by the court and safely watched and protected for a period of more than nineteen years. You cannot compel him to receive his money before it is due. To do so would be not merely to impair the obligation of his contract. It would annul and terminate it.

There is no doubt that as between the parties to the mortgage a second mortgage is a conveyance of the land, and whenever the estate of the first mortgagee is divested, by the payment of this debt or otherwise, the second mortgage operates fully as a conveyance of the whole estate. But so long as the first mortgage is subsisting the second mortgagee as between himself and the first mortgagee, acquires only his mortgagor's equitable right of redemption. *Goodman* v

White, 26 Conn. 320. But it is further insisted, in support of the construction claimed by the first mortgagees, that section 458 requires the mortgaged premises to be appraised and sold for not less than two-thirds of such appraised value, and that the rule is established in this State, that where appraisement of real estate is required, the appraisers must return the money value of the land. This rule relates to sales upon executions at law. In *Baird et al.* v. *Kentland et al.*, 8 Ohio R. 21, where the interest of a mortgagor was levied upon, the court held that the entire estate in the land must be appraised, and that there was no authority to appraise the mortgagor's equity of redemption.

The statute provided "that if execution be levied upon land and tenements, the officer levying such execution shall cause an inquest of three disinterested freeholders" and "administer to them an oath to appraise the land, and said freeholders shall return to said officer an estimate of the real value in money of said estate." The word "estate" in the latter clause was held to mean the same as "land" in the former. But in the *Lessee of Joseph Canby* v. *Foster*, 12 Ohio 79, it is held that the freehold of an husband in his wife's lands may be sold on execution. LANE C. J. says: "The interest of the husband is a legal estate; it is a freehold during the joint lives of himself and wife, with a freehold in remainder to himself for life, as tenant by the courtesy and a remainder to the wife and her heirs in fee. It is a certain and determinate interest, whose value may be easily ascertained by reference to well-known rules, it is in every sense his land within the meaning of the statute."

And in speaking of lands incumbered by mortgages he says: "As no true, perfect authoritive binding estimate of the value of the incumbrance can be taken by the appraisers, the law forbids the inquiry and admits of no sale except as of incumbered property. The effect of this rule is to *throw into chancery* sales of mortgaged lands, except where the purchaser is willing to encounter the risk of the burden."

Here it will be seen the sense of the word "land" is limited. Any legal estate, whether it be fee simple, an estate for life, or a mere possessory interest may be sold on execution.

Scott v. *Douglass*, 7 Ohio 228; *Miner* v. *Wallace*, 10 Ohio 403. But an equitable interest in real estate cannot be levied upon. *Haynes* v. *Parker*, 5 Ohio State 253. The law has never permitted it. Executions follow judgments at law. The appraisers are not a proper tribunal to determine the extent of the equitable interest of a debtor in real estate. This is the business of the court. But where such interest is ascertained, and its limits defined by the court, it is as easy of valuation as an estate for life or years. The statute expressly authorizes an equitable interest of a decedant's estate to be appraised and sold. S. and C. 589. But in proceedings in foreclosure they are the "mortgaged premises" that are required to be appraised. No matter whether the mortgagor has a legal or equitable title. If the owner of an estate for years mortgages it, upon foreclosure, the mortgaged property to be appraised is the estate for years. If the purchaser of a parcel of land by contract, upon which he has paid but one-half of the purchase price, mortgages his interest in such lands, upon foreclosure, the mortgaged premises are his equitable interest, and not the whole lands. And if an equity of redemption is conveyed by mortgage such equity constitutes the mortgaged property.

A decree may be entered, finding that the plaintiff is entitled to redeem the premises from sale under the first and second mortgages, by paying the amount due thereon and ordering that, unless the mortgagor pay the amount due on said third mortgage within thirty days, said premises be sold thereunder, subject to the lien of said prior incumbrances, and that to the extent of the amount paid to redeem by said plaintiff he be subrogated to the rights of the prior mortgagees.